Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

I. Whether the denial of a predeprivation hearing and loss of possession of Petitioners' land for two years (and continuing) during a local governmental eminent domain proceeding is a violation of due process under the Fourteenth Amendment?

II. Whether denial of a predeprivation hearing and destruction of private property as directed by local governmental officials during an eminent domain proceeding creates absolute immunity for said public officials and their private contractor under 42 U.S.C. § 1983?

III. Whether the denial of *both* the Petitioners' (a) use of their land and (b) the "award" deposited into court, for over two years (and continuing) creates a procedural violation of due process under the Fourteenth Amendment?

IV. Whether dismissal of a cause of action pursuant to 42 U.S.C. § 1983 against governmental officials (and contractor) that directed and performed destruction of property before the predeprivation hearing occurred in an eminent domain case is a violation of procedural due process when the Court directed the property owner's only relief is within the pending condemnation case in which said public officials (and contractor) are not parties?

PARTIES

The participants in the proceedings below were:

Mary Catherine Borelli McNeil; Mary Catherine Borelli McNeil, as mother, next friend, guardian and custodian for minors Jenifer Nicole McNeil and Sarah Faith McNeil; John W. Borelli, Jr.; John W. Borelli, Jr., as father, next friend, guardian and custodian for minors Stephen Thomas Borelli, Eleanor Mary Borelli and Marguerite Claire Borelli; Margaret Anna Borelli Fent; Elizabeth Ann Fent; David Jerome Fent and Margaret Mary Fent, Plaintiffs,

v.

Oklahoma City Urban Renewal Authority, a public body corporate; and Stanton L. Young, K. E. Smith and Wiley Rice, individually and in their official capacity as Directors of the Oklahoma City Urban Renewal Authority; and Midwest Wrecking Co., a corporation, Defendants.

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No. _____

In The

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October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review the decision of April 19, 1995, of the Supreme Court of Oklahoma and the Court of Appeals of the State of Oklahoma, Division No. 2, opinion.

OPINIONS BELOW

The Order denying Petitioners' Petition for Writ of Certiorari filed in the Supreme Court of the State of Oklahoma and directed to the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the

Appendix to this Petition at A1. The opinion of the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the Appendix to this Petition at B1-B4. The opinion of the District Court of Oklahoma County, State of Oklahoma, is reprinted in the Appendix to this Petition at C1-C2.

JURISDICTION

The Order of the Supreme Court of the State of Oklahoma denying Writ of Certiorari was rendered on April 19, 1995 and filed April 20, 1995. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment to the Constitution of the United States provides:

> **Amendment XIV.**
>
> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

2. 42 U.S.C § 1983 provides:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

3. Okla. Stat. tit. 66, § 53(C) (West 1991) provides:

> § 53. Taking by eminent domain – Commissioners – Appointment and proceedings – Right to construct road
>
> (C) The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the

property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

4. Okla. Stat. tit. 66, § 55(A) (West 1991) provides:

§ 55. Review of commissioner's report – Jury trial – Notice – Costs

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment

entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

STATEMENT OF THE CASE

A. Factual Background (eminent domain proceeding)

Eminent domain authority in Oklahoma comes from Article 2, Section 24, Constitution of Oklahoma. The Respondent, OKLAHOMA CITY URBAN RENEWAL AUTHORITY (hereinafter referred to as "OCURA") received its condemnation powers from Okla. Stat. tit. 11, § 38-111 (West 1991) and § 38-111(B) provides that urban renewal authorities will use the condemnation procedure prescribed for railroad companies found in Okla. Stat. tit. 66, § 51 et seq. (West 1991).

On January 23, 1990, OCURA filed its petition for condemnation naming Petitioners as Defendants with respect to real property Petitioners owned and operated as a parking lot business.

The condemnation case was filed in the District Court of Oklahoma County, Oklahoma, Case No. CJ-90-624. Pursuant to a notice being served upon the Petitioners. A hearing was held for the purpose of appointing three commissioners (appraisers) to determine the market value of the fee title in the land being taken.

On May 14, 1990, the "Report of Commissioners" with an award of $74,000.00 was filed in the condemnation action and on the same day OCURA deposited the amount of the award into the court clerk's office.

On May 29, 1990, the Petitioners filed "exceptions" to the "Report of Commissioners" objecting to the taking on various grounds of public need and necessity as per authority under Okla. Stat. tit. 66, § 55(A). Also, a demand for jury trial to hear the question of the amount of damages (market value) was filed pursuant to this same § 55(A).

Thereafter, OCURA employees posted notices on cars parked on Petitioners' property stating a change in the ownership and to vacate the premises.

The filing of "exceptions or objections" to the taking gives Respondents notice that Petitioners intend to continue use of their private property until a court determines whether a public need and necessity exists before possession is granted. OCURA officials completely ignored this filing. OCURA as plaintiff in an eminent domain proceeding is the moving party and has the burden to satisfy all constitutional and statutory requirements before possession is allowed. Oklahoma is not a "quick take" state in eminent domain proceedings.

On September 19, 1990, the Respondents, STANTON L. YOUNG, K. E. SMITH and WILEY RICE (hereinafter referred to as "YOUNG", "SMITH" and "RICE") as directors of OCURA approved a demolition and clearance contract with Respondent, MIDWEST WRECKING CO. (hereinafter referred to as "MIDWEST") for Petitioners' parking lots.

From October 1 through 15, 1990, MIDWEST destroyed and removed the parking lot surface. Thereafter, OCURA employees installed a "pole and cable" type fence to secure the land from further use. To this date the private property is in possession of OCURA.

State and federal courts have held that if the Petitioners withdraw their award from the court clerk's office, Petitioners will waive their "exceptions or objections" to the taking. One cannot have their cake and eat it at the same time! Therefore, Petitioners are in an equal protection and due process "Catch 22" procedural situation. Petitioners have been denied the use and possession of their private property (and its business) by an illegal early entry *and* denied the use and possession of the deposited award during the same illegal early entry.

On October 17, 1990, (two days after destruction of parking lots) the Petitioners sought an injunction in the pending eminent domain case prohibiting destruction of the parking lots. The trial court denied the injunction request on an agreed order since all the property was destroyed. An appeal from this injunction order was affirmed by the Court of Appeals for the State of Oklahoma, Division No. 1 on August 25, 1992, and published as *Oklahoma City Urban Renewal Auth. v. Borelli*, 848 P.2d 33 (Okl. App. 1992).

On February 9, 1993, the Supreme Court of the State of Oklahoma denied a Writ of Certiorari to review this Court of Appeals opinion on the injunction issue by a five to four vote.

No action has occurred in the eminent domain case since the denial of a Writ of Certiorari as to the injunction

issue. The Petitioners' property remains in possession of OCURA and the award remains in the District Court Clerk's Office.

B. Proceedings Below (civil rights action)

On September 21, 1992, (before the running of two years from destruction of the parking lots), Petitioners' filed an action in the District Court of Oklahoma County, Oklahoma, Case No. CJ-92-7943 alleging trespass, constitutional and civil rights counts against all the Respondents as caused by the denial of a predeprivation hearing on the Petitioners' filed "exceptions" and destruction of parking lots.

The filing of an action on September 21, 1992, in Case No. CJ-92-7943 for trespass, constitutional and civil rights violations is how the federal questions were first raised under U.S. Supreme Court Rule 14(h).

On August 17, 1993, the trial court sustained the Respondents' motion to dismiss the counts in trespass, constitutional and civil rights without prejudice to Petitioners' right to pursue their remedies in the pending condemnation action, CJ-90-624-64.

This creates a procedural problem! The Respondents, YOUNG, SMITH, RICE and MIDWEST are *not* parties in the pending eminent domain proceeding. The Court's action was to dismiss the case, *not* consolidate the cases. Therefore, Respondents YOUNG, SMITH, RICE and MIDWEST are no longer in any action and have been granted absolute immunity for their acts.

An appeal was filed by Petitioners. The Court of Appeals, Division 2, State of Oklahoma, filed a memorandum opinion (dated December 27, 1994) affirming the trial court's dismissal.

On April 20, 1995, the Supreme Court of the State of Oklahoma denied a Writ of Certiorari to review the Court of Appeal's opinion by an eight to one vote.

REASONS FOR GRANTING THE WRIT

This case is civil rights verses eminent domain. This is a case of first impression. Does the mere fact the civil rights violations occur during an eminent domain proceeding give public officials (and their contractors) absolute immunity?

Civil rights and constitutional violations can occur before, during or after a criminal proceeding. Can civil rights or constitutional violations occur before, during or after other type proceedings such as eminent domain?

This Oklahoma State court held that civil rights and constitutional violations *cannot* occur during an eminent domain proceeding and the landowners only remedy being to recover the market value of the land and its improvements from only the Respondent, OCURA, in the eminent domain proceeding. This results in a procedural trap.

The Court's dismissal of the civil rights case against Respondents YOUNG, SMITH, RICE and MIDWEST grants them absolute immunity (regardless of their acts)

because YOUNG, SMITH, RICE and MIDWEST are *not* parties in the eminent domain action.

All citizens in Oklahoma can have civil rights actions against local governmental officials, except these Petitioners.

PROPOSITION I

THE DIRECTION BY PUBLIC OFFICIALS (AND CONTRACTOR) TO DESTROY PRIVATE PROPERTY AFTER A NOTICE FILED BY OWNERS OBJECTING TO TAKING AND WITHOUT A PREDEPRIVATION HEARING IN AN EMINENT DOMAIN CASE CREATES A SEPARATE CONSTITUTIONAL AND CIVIL RIGHTS ACTION.

Until title passes to the government, a landowner is free to make whatever use it pleased of its property. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. at 13, 81 L.Ed.2d 1, 104 S. Ct. 2187 (1984).

Okla. Stat. tit. 66, § 53(C) (West 1991) provides that a condemnor shall, at any time before it enters upon said real property, pay to said court clerk the award for use of said owner.

However, the depositing of the award into Court in an Oklahoma condemnation case does not allow a legal entry. The condemnor (and its contractor) does *not* have a legal entry until the pending exceptions are overruled. Our state court has previously discussed this in the *Town of Ames v. Wybrant*, 220 P.2d 693, 695 (Okl. 1950) which provides:

> "Such conclusion could be sound only on the assumption that the law would permit the City

> to take possession before its right so to do is established. Such a taking would be violative of constitutional restrictions and there is no authority therefor. The conclusion is sought to be predicated upon the effect of Tit. 66 O.S. 1941, § 53, permitting the corporation, upon payment of the damages assessed, to enter upon the premises, and upon the cases construing said section. The situation contemplated by the statute and obtaining in the cases construing it *is one where the right to condemn the premises is not in question.* * * * ." (Emphasis supplied)

The Petitioners' absolute statutory right to contest the need and necessity of a taking by exceptions is contained in Okla. Stat. tit. 66, § 55(A) which provides:

> "(A) The report of commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the *court shall* make such order herein as right and justice may require, either by *confirmation, rejection* or by *ordering a new appraisement* on good cause shown; * * * ." (Emphasis supplied)

The Petitioners filed exceptions questioning the public need and necessity for the project.

With full notice and knowledge the Petitioners wanted to keep their private property until the predeprivation hearing (on the exceptions), the individual directors YOUNG, SMITH and RICE awarded a demolition contract to MIDWEST.

Said acts by YOUNG, SMITH and RICE show a deliberate indifference to the rights of the Petitioners under State eminent domain procedural law.

Until the court confirms the report (overrule the exceptions) allowing the "Report" to stand without objections, the possession and title cannot pass. In *Harn v. State*, 87 P.2d 127, 129 (Okl. 1939) our court said:

> " * * * The report, if allowed to stand without objection, serves to pass the use or title condemned. * * * ."

In *Town of Ames v. Wybrant*, 220 P.2d 693 (Okl. 1950) our court, in "Syllabus by the Court" number 4, said:

> "4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn.

And, in the body of the case, our court said:

> "Therefore the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor. To such effect, we stated in Wrightsman v. Southwestern Natural Gas Co., 173 Okl. 75, 46 P.2d 925, 929: " * * * In such cases denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the law."

Wybrant, supra, page 697.

A timely predeprivation hearing must be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The meaningful time and meaningful

manner for the predeprivation hearing in an eminent domain proceeding is at the hearing on the Petitioners' exceptions and *before* the property is destroyed.

Before a person can be deprived of his property by the State, it must accord that person procedural due process. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). The denial of predeprivation and/or postdeprivation hearings or remedies for property rights can violate Fourteenth Amendment due process and equal protection. See *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S. Ct. 1906 (1981) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265, 102 S. Ct. 1148 (1982).

In *Kirby Forest Indus., Inc. v. United States*, 467 U.S. at 14 and n. 26, 81 L.Ed.2d 1, 104 S. Ct. 2187 this court said:

> " * * * . We conclude, in sum, that petitioner has failed to demonstrate that its interests were impaired in any constitutionally significant way before the Government tendered payment and acquired title in the usual course.[26] * * * ."

And, at note 26:

> "26. Had petitioner made such a showing, complex questions would have arisen regarding the measure of "just compensation." We defer resolution of those questions to a case in which they are fairly presented."

In our case of first impression, Petitioners have shown that the government has not acquired title to the property and has impaired the constitutional rights of the Petitioners in a significant way.

The postdeprivation remedy Ordered by the Oklahoma court in our case at argument is to return to the eminent domain case and collect your market value damages you were going to recover in the first place. This is not an adequate postdeprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984).

However, Nichols' The Law of Eminent Domain, revised 3rd Ed., § 8.05(3), page 8-96, (Rel 49-8/91 Pub. 460) states:

> [3]-*Illegal Taking*.
>
> "The rule that damages are to be assessed as of the date of the taking does not contemplate a physical taking not sanctioned by law, but a taking by appropriate legal proceedings. * * * ."

And, see § 12A.04, page 12A-13, (Rel. 45-11/89 Pub. 460) of Nichols, supra, which states:

> § 12A.04 *Assessment Involving an Illegal Taking*
>
> "The rule that damages are to be assessed as of the date of the taking contemplates a taking by appropriate legal proceedings, rather than a physical taking not sanctioned by law. * * * ."

The U.S. Supreme Court has held that § 1983 actions may be brought in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11-12, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980).

The Oklahoma Supreme Court has held that state courts must entertain a 42 U.S.C. § 1983 lawsuit. See *Willborn v. City of Tulsa*, 721 P.2d 803, 805 (Okla. 1986) and *Robert K. Bell Enterprises v. Tulsa County Fair*, 695 P.2d 513, 517-19 (Okla. 1985).

PROPOSITION II

THE DENIAL OF BOTH THE PETITIONERS' POSSESSION TO THEIR LAND AND DENIAL OF THE AWARD DEPOSITED INTO COURT IS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

When OCURA directors authorized the MIDWEST demolition contract, with pending exceptions, it denied the Petitioners possession rights to *both* the "property" and the "award" by an illegal attempt to force the "award" upon the Petitioners. How can this happen?

In *Henry v. United States*, 46 F.2d 640, 642 (3rd Cir. 1931) the court said:

> "When a property owner accepts the award of damages for taking his property under eminent domain, he cannot raise the question as to the validity of the proceedings or taking."

In *Oklahoma City v. Cooper*, 420 P.2d 508, 512 (Okla. 1966) this court said:

> " * * * . When a property owner accepts the award of damages for taking his property under eminent domain, he cannot raise the question as to the validity of the proceedings or taking. * * * ."

Thus, *if* Petitioners withdrew the "award" from court, they would be waiving Petitioners' "exceptions" and giving up objection to possession. OCURA's depositing the award into court does *not* buy, payoff, waive, continue, eliminate, make retroactive or make an illegal entry legal.

Thus, Petitioners are caught in a "catch 22" procedural due process or equal protection dilemma. *All*

property rights have been taken from the Petitioners for over four years (and continuing) with no relief in sight.

OCURA has its land. Why should it do anything different? This creates a due process violation in which the U.S. Supreme Court should act.

PROPOSITION III

A PRIVATE CONTRACTOR ACTING UNDER COLOR OF LAW BY AND THROUGH A GOVERNMENTAL AGENCY IS LIABLE FOR ITS ACTS PURSUANT TO CIVIL RIGHTS LAW.

Local governmental units going "private" with governmental functions such as police enforcement, prisons, etc. seems to be the latest trend.

Generally, private parties do not act under color of state law. In certain situations, however, private parties expose themselves to liability under constitutional and civil rights (42 U.S.C.A. § 1983) provisions. For example, private parties assisting a state (public) agency in carrying out an unlawful action, or engaging in prohibited conduct with nonimmune state (public) officials, act under color of state law for constitutional and civil rights violation purposes. *Grow v. Fisher*, 523 F.2d 875 (7th Cir. 1975); *Holmes v. Silver Cross Hospital of Joliet*, 340 F. Supp. 125 (N.D. Ill. 1972). Were it otherwise, state (public) officials could insulate themselves from constitutional and civil rights suits by entrusting certain duties to private parties. See *Braden v. University of Pittsburgh*, 477 F.2d 1, 7 (3rd Cir. 1973) and *Tomkins v. Village of Tinley Park*, 566 F. Supp. 70 (N.D. Ill. 1983).

For Tenth Circuit cases from Oklahoma holding private companies liable in the deprivation of property without a hearing, see *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) holding the Wrecker Service Company jointly liable and *McKee v. Heggy*, 703 F.2d 479 (10th Cir. 1983) holding Pucketts Wrecker Service Company jointly liable.

A contractor was found to be acting under color of law in *Verdi v. City of Philadelphia*, 553 F. Supp. 334 (E.D. Pa. 1983), where the contractor demolished complainants' property under a contract with the city pursuant to a city building code. Relying on *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982), the court held that the demolition, submitted to be without due process for the owner, was an activity under color of law. The private contracting of governmental services and use of this procedure to avoid § 1983 liability is a subject the U.S. Supreme Court needs to speak out on.

CONCLUSION

In light of the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Oklahoma and the Court of Appeals of the State of Oklahoma, Division No. 2.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, April 19, 1995

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

(Filed April 20, 1995)

82,031 *Mary Catherine Borelli McNeil et al. v. Oklahoma City Urban Renewal Authority,* a public body corporate et al.

Certiorari denied.

CONCUR: Wilson, C.J., Kauger, V.C.J., Hodges, Lavender, Simms, Hargrave, Summers, Watt, JJ.

DISSENT: Opala, J.

/s/ Alma Wilson
ALMA WILSON
Chief Judge

APPENDIX B

IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

MARY CATHERINE BORELLI McNEIL; ET AL.,	)	
Appellants/Plaintiffs,	)	No. 82,031
vs.	)	NOT FOR PUBLICATION
OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; ET AL.,	)	
Appellees/Defendants.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Honorable Carolyn R. Ricks, Trial Judge

MEMORANDUM OPINION

(Filed Dec. 27, 1994)

BOUDREAU, P.J.

Plaintiffs appeal an order of the trial court dismissing their action against all Defendants. In this action for trespass and constitutional and civil rights violations, the issue on appeal relates to whether Plaintiffs' action may be pursued in this proceeding when a previously filed condemnation action is pending. We hold that it may not and affirm the trial court.

Condemnor (OCCURA) SUED Condemnees (Plaintiffs) for condemnation of certain property. In that lawsuit, the appointed Commissioners filed their Report.

Plaintiffs filed an exception to the report of the Commissioners contending, among other things, that the project was not necessary and that the condemning authority did not need their land. The condemnor deposited the amount of the commissioner's award into the Court Clerk's Office.

Subsequent to the filing of the report of the commissioners and the depositing of the appropriate monies in the court fund by Plaintiffs, but prior to the trial court ruling on the exceptions of Plaintiffs to the report, the condemnor took possession of the condemned property. It then entered into a contract with Defendant Midwest to demolish a parking lot located on the condemned property. Midwest subsequently performed the demolition.

Plaintiffs contended that the condemnor and Midwest "jumped the gun" and should not have entered onto the property and proceeded with the demolition until such time as the trial court had *ruled* on Plaintiffs' exceptions to the report of the commissioners. (In this particular case, that ruling has still not taken place.) Accordingly, Plaintiffs filed this lawsuit against Condemnor, its three directors, individually, and Midwest, alleging trespass and constitutional and civil rights violations.

All Defendants in the present lawsuit filed a motion to dismiss contending, among other things, that because there was a pending condemnation action to which Plaintiffs were a party, Plaintiffs were required to raise their allegations of damages within that action. The trial judge sustained Defendants' motions to dismiss holding specifically that the dismissals were without prejudice to

Plaintiffs reasserting their claims in the condemnation lawsuit. It is from this ruling that Plaintiffs appeal.

The facts, as they relate to the precise issue upon which the court based its decision, are not in dispute. The issue presented on appeal is a legal one. Contested issues of law are reviewable in all actions, suits, and proceedings by a de novo standard. *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Review of law is called "de novo," which means no deference, not necessarily a full rehearing or new factfinding. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

This case is controlled by the holding of the Oklahoma Supreme Court in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977). In *Young*, the condemnee commenced a separate action against the condemnor and other defendants after the condemnor had instituted condemnation proceedings to secure a pipeline right-of-way across condemnee's land. The condemnee alleged as grounds for recovery the violation of state and federal antitrust laws, abuse of process and trespass. In upholding the decision of the trial court in sustaining special demurrers and in refusing to permit the amendment of the petition, the supreme court held that the authority of an entity to exercise the power of eminent domain was part of a condemnation proceeding and could not be collaterally pursued in a separate proceeding. The court also held that any damage for trespass had to be tried in the condemnation proceeding.

It is clear that the operative facts that give rise to Plaintiffs' claims against Condemnor and other Defendants have their origin in the condemnation proceeding.

Plaintiffs claim that Condemnor and other Defendants appropriated their private land without taking all the steps legally requisite to do so. Under the authority of *Young*, this issue and the issue of the resultant damage to Plaintiffs must be determined in the context of the condemnation proceeding. It makes no difference that the alleged damage in this case occurred prior to the time an order confirming the report of the commissioners was entered, see *Delhi Gas Pipeline Corporation v. Swanson*, 520 P.2d (Okla. 1974); or that eminent domain proceedings are proceedings "in rem". See *Allen v. Transok Pipeline Co.*, 552 P.2d 375, 380 (Okla. 1976) (a distinct cause of action for trespass and punitive damages can be tried in the same case as a cause of action for condemnation).

We hold that the trial judge was correct in dismissing the suit filed by Plaintiffs. We further note that the trial judge specifically based her decision dismissing the case on the principle that Plaintiffs could not maintain this action with the condemnation proceeding pending. She made no rulings on any other defenses offered by Defendants in their briefs. Accordingly, we have limited our review to the adjudicated issue.

AFFIRMED.

REIF, C.J., and RAPP, J., concur.

APPENDIX C

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MARY CATHERINE BORELLI McNEIL, et al., Plaintiffs,	)	
vs.	)	Case No. CJ-92-7943-67
OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate, et al., Defendants.	)	

JOURNAL ENTRY

(Filed Aug. 17, 1993)

Defendants' Motions to Dismiss were set for hearing on the 30th day of April, 1993. Prior to that date, the Court informed the parties that Defendants' Motions would be decided upon the briefs submitted and without oral argument. Plaintiffs were represented by their counsel, Richard Hampton; defendants Oklahoma City Urban Renewal Authority, Stanton L. Young, K. E. Smith and Wiley Rice, were represented by their counsel, Batchelor and Powers, P.C., by Dan Batchelor and Janis S. Powers; defendant Midwest Wrecking Co. was represented by its counsel, J. R. "Randy" Baker of the firm Holloway, Dobson, Hudson & Bachman.

After reviewing the pleadings and having read the briefs, the court sustained defendants' motions to dismiss without prejudice to plaintiffs' right to pursue their remedies in the pending condemnation action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss are hereby sustained and this action is hereby dismissed without prejudice to plaintiffs' right to pursue their remedies in the pending condemnation actions, CJ-90-624-64.

/s/ Carolyn R. Ricks
CAROLYN R. RICKS
JUDGE OF THE
DISTRICT COURT